IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KATHY RUESCHMAN,

Plaintiff,

v.

AMERICAN UNITED LIFE INSURANCE CO. and DISABILITY REINSURANCE MANAGEMENT SERVICES, INC.,

Defendants.

OPINION AND ORDER

11-cv-241-wmc

Plaintiff Kathy Rueschman is suing defendants American United Life Insurance Co. and Disability Reinsurance Management Services, Inc. to recover long-term disability benefits under an employee benefit plan governed by ERISA. Defendants denied her claim, having found insufficient objective evidence that symptoms related to her fibromyalgia limited her functional capacity to perform her job duties. Now before the court are plaintiff's motion for summary judgment (Dkt. #22), and defendants' request for summary judgment (Plt. Resp. Br., dkt. #34, at 20), which the court will treat as a cross-motion for summary judgment under Rule 56(f). Because defendants' benefits determination is subject to *de novo* review and a genuine issue of fact exists as to whether Rueschman's fibromyalgia limits her physical and mental ability to perform her job duties, the court will deny both motions.

UNDISPUTED FACTS[1]

The Parties

Plaintiff Kathy Rueschman was employed as an "Accounting Administrator" by The Press of Ohio, Inc, which provided its employees with group long-term disability insurance. Defendant American United Life Insurance Co. ("American United") issued the policy and Disability Reinsurance Management Services, Inc. ("Disability RMS") acted as the third-party administrator.

Initial Disability and Diagnosis of Fibromyalgia

On January 12, 2007, Rueschman stopped working due to her medical conditions. At the time, her symptoms included depression, anxiety, joint pain, reflux and lack of energy. She applied for short term disability benefits on January 24, 2007. As part of

[1] The court draws undisputed facts from (1) plaintiff's "factual summary" to which defendants' responded, but only to the extent supported by the record, and (2) defendants proposed findings of fact e-filed in accordance with the court's Preliminary Pretrial Conference Order. (Dkt. #14.) The court would, however, be remiss not to address briefly the many deficiencies in plaintiff's summary judgment filings. Instead of filing separate, objective proposed findings of fact supported by citations to the record as required by this court's order, plaintiff filed a slanted "factual summary" in her brief with citations to the record -- often string citations to many documents. This mistake would normally have resulted in a denial of plaintiff's motion or at least require plaintiff to refile, but for defendants filing a response that separated out those sentences which they dispute. Plaintiff again disregarded the court's order in its response to defendants' supplemental proposed findings of fact, offering lengthy and argumentative responses and reciting additional facts that are not responsive to defendant's proposed fact. *See* Pltf.'s Resp. to Dft.'s PFOF, Dkt. #38, ¶¶14, 20, 38, 39, 40, 42, 50, 51, 52, 55, 56, 57. Accordingly, the court will disregard all of these responses.

that claim, she filled out an Employee Statement form supplied by American United. (Dkt. #33, AUL 801.)[2]

On March 1, 2007, Lori Leonard, a doctor of osteopathy, examined Rueschman. Her physical examination revealed "multiple fibromyalgia tender points along the cervical, parascapular, traps, elbows and knee and tenderness rigitidity C spine T spine paraspinous muscle. (Dkt. #24-4, at 45) Dr. Leonard issued a work release until April 15, 2007, which she continued on April 13, 2007 because the "medication regime is not helping." (*Id.* at 43, 50.) Another physical exam on May 10 documented continued symptoms, including fatigue, joint pain, insomnia, inability to concentrate, headaches and irritable bowels. (*Id.* at 56.) At that time, Dr. Leonard continued the work release for another six weeks "for [] psychiatry" and noted to "consider referral to rheum re fibromyalgia if neg up to next steps." (*Id.*)

In early March 2007, Disability Reinsurance's analysts contacted Rueschman's treating counselor and concluded "with a reasonable degree of medical certainty the claimant is currently impaired from performing activities that require concentrated and focus[ed] thought and executive functioning" due to depression and anxiety. (Dkt. #24-3, at 52-53.) On August 30, 2007, Disability RMS approved Rueschman for long-term

[2] Defendants filed a paper version of the administrative record with their Bates numbering, citing only the numbering in their filings, because plaintiff's Bates numbering is illegible when printed. In fact, plaintiff's numbering is legible on the electronic version. In fairness to defendants, however, plaintiff's version of the record is 220 pages shorter than defendants' version and is also missing important pages, such as pages from Dr. Hogan's medical review. (*Cp.* dkt. #24-6 at 31-33 *to* dkt. #33, AUL 309-12). Since neither party noted, nor corrected these discrepancies, the court will cite to its electronic docket and page number where possible and to defendants' paper version only where the court was unable to make the relevant cross-references.

disability benefits, finding that she qualified for mental illness disability "based on anxiety and depression." (Dkt. #24-4, at 183.)

In September 2007, Dr. Ann Meyer examined Rueschman and noted positive fibromyalgia trigger points. (*Id.* at 84.) Between late 2008 and early 2009, plaintiff's medical records contain notes from several office visits in which the physician records Rueschman's statements about her condition. Dr. Meyer notes that Rueschman stated that (1) she was doing poorly because of her fibromyalgia and depression; and (2) her fibromyalgia symptoms were causing most of her problems.[3]

Dr. Meyer referred Rueschman to Jim Bressi, a doctor of osteopathy. Dr. Bressi concluded that plaintiff had "symptomatic fibromyalgia syndrome" and noted that she had "spinal tenderness throughout" and "multiple tender points above and below the waist posteriorly and anteriorly, greater than 11." (*Id.* at 92.) Dr. Bressi's consultation report includes no opinions about plaintiff's physical and mental abilities.

Initial Review of Rueschman's Physical Disability Claim

The plan includes a mental illness limitation that restricts long-term disability benefits for mental illness to 24 months. As a result, Rueschman's mental illness disability benefits were scheduled to end on July 12, 2009.[4] In early 2009, Disability RMS began a review of plaintiff's medical conditions to determine whether her fibromyalgia qualified for extended benefits as a physical limitation. At the time,

[3] Plaintiff repeatedly cites these statements as though they were the physicians' own conclusion, which is both troubling and a disservice to the interests of justice.

[4] Because the plan states that benefits are payable only after an individual is disabled for 180 days, defendants' initial benefits decision was retroactive only to July 12, 2007.

Rueschman was still seeing Dr. Meyer. In March 2009, Dr. Meyer responded to a Disability RMS letter, stating that Rueschman has "symptoms relating to her fibromyalgia that are keeping her from working – [back ache], fatigue, sleep problems, joint and muscle pain, etc." (Dkt. #24-5, at 52.)

Defendants were still reviewing Rueschman's claim on July 12, 2009, when the mental illness benefit ended, and continued paying her benefits during the review period. In the fall of 2009, Disability RMS conducted a phone interview with Rueschman to discuss her conditions and reviewed a Training, Education and Experience Form that she had completed. In addition, Disability RMS contacted Rueschman's treating physicians, asking for updated medical records and completion of an "attending physician's statement."

At some point, Dr. Meyer left the practice and Rueschman was assigned to Dr. Amy Jo Friedman, a family practitioner. (Dkt. #24-6, at 32.) Dr. Friedman completed the attending physician statement for Disability DMRS on September 15, 2009. (Dkt. #24-5, at 61.) Friedman noted (1) Rueschman's diagnoses as fibromyalgia and hypertension and (2) Rueschman's current symptoms were "fatigue, sleep problems, joint and muscle pain, [blood pressure]." In the space labeled "extent of disability," Friedman wrote only that Rueschman cannot engage in "heavily lifting." She rated Rueschman's physical impairments as Class 4 -- meaning "moderate limitation of functional capability, capable of clerical/administrative (sedentary) activity (60-70%)" -- and her mental impairment as Class 4 -- meaning "patient unable to engage in stress situations or engage in interpersonal relations (marked limitation)." Friedman also indicated that (1)

Rueschman's condition was unchanged; and (2) Rueschman could not expect significant improvement in the future. Friedman later signed a letter confirming that her conclusion that Rueschman had "full time sedentary work capacity." (Dkt. #33, at AUL 296.)

As part of its initial review, Disability RMS also hired Dr. Sharon Hogan to review Rueschman's medical file. Hogan did not physically examine Rueschman, but rather reviewed "all medical data available to date." (Dkt. #24-6, at 31.) Her report discusses Dr. Bressi's exam from September 11, 2007, but does not mention his finding that Rueschman had more than 11 tender points.

Instead, Hogan noted that Drs. Friedman and Meyer did not think that Rueschman was incapable of a sedentary work and that Rueschman had worked for several months with fibromyalgia.[5] Hogan further concluded that Rueschman was subject to the following work restrictions: (1) being able to change positions, (2) occasionally lift up to 20 pounds and frequently lift 10 pounds, (3) occasionally do activities with arms above shoulder level and (4) occasionally bend, stoop, crouch and squat. Consequently, she concluded that Rueschman could perform the physical demands of her occupation.

In addition, Disability RMS performed an occupational analysis. The analyst defined the requirements for an accounting administrator and, relying on Hogan's assessment of her abilities, concluded Rueschman was capable of performing her job.

[5] Rueschman argues that this finding was inconsistent with her medical records, stating that she reduced her hours soon after the illness began because of difficulty with vomiting and depression, despite taking Cymbalta. (Robb Notes, dkt. #24-4, at 86, RUE 171.)

On December 22, 2009, American United notified Rueschman that it found she had the physical capacity to return to work and thus was not "totally disabled." (Dkt. #24-5, at 75.) In keeping with this finding, American also ceased paying benefits and advised Rueschman of her appeal rights.

Rueschman's First Appeal

Rueschman filed an appeal from American United's denial of benefits on March 26, 2010. In a May 11, 2010 letter, Disability RMS replied, stating that it received her appeal and providing notice of its internal appeal process. (Dkt. #33, at AUL 265.) Disability RMS contacted Rueschman to discuss her condition and treatment, as well as to request updated medical documentation from her physicians. (*Id.* at AUL 255-56.)

In October 2009, Dr. Friedman left the practice and Rueschman was assigned to Dr. Isabella Lane. Rueschman saw Dr. Lane at least three times in late 2009 and early 2010. Lane's notes in the record contain no discussion of work restrictions. During a musculoskeletal exam of Rueschman on January 22, 2010, Lane found "positive tenderness in the bilateral occiputs, trapezius muscles, L5 level, PSIS," and "[g]eneral tenderness along the T-spine and L-spine paraspinal musculature." (Dkt. #24-6, at 1, 3.) Lane diagnosed Rueschman with fibromyalgia.

Rueschman also received a phsyiatric examination by Dr. Mark J. Pellegrino on February 4, 2010. (Dkt. #24-6, at 3.) Rueschman later told Disability RMS that this exam was the most thorough she has ever received. Dr. Pellegrino found that Rueschman still experienced symptoms, including poor sleep, fatigue, cognitive dysfunction and "difficulty performing activities" that were "associated" with her fibromyalgia. Dr.

Pellegrino concludes that "I think presently her fibromyalgia related impairments are interfering with her ability to perform her accounting job. I don't believe she's able to work at this time."

On March 17, 2010, Rueschman sent Disability RMS an attending physician's statement from Dr. Pellegrino, finding she has a level 5 physical impairment that leaves her "incapable of minimal (sedentary) activity." (Dkt. #24-6, at 12.) Pellegrino also states that she has "15/18 tender points, fatigue, pain, poor sleep and cognitive [dysfunction]." He further states that Rueschman is restricted because she "needs frequent breaks, [is] unable to remain in any position longer than 15 minutes," cannot do "continuous upper body typing and computer work, [and] has difficulty concentrating, poor memory and mental fog."

On June 28, 2010, Rueschman notified defendants that she had switched from Dr. Lane to Dr. Jeffrey Eckman, "due to numerous communication problems and the turnover of physicians with this practice, [as a result of which, Rueschman] no longer felt that [she] could receive the care that [she] needed." (Dkt. #33, at AUL 213.) Disability RMS responded that Rueschman should provide any records from Eckman that she wanted it to consider, but she failed to do so. (Dkt. #33, at AUL 211.)

At this point, Disability RMS hired a doctor board certified in internal medicine and rheumatology to review Rueschman's medical history for her appeal. While Dr. Hall Martens did not conduct a physical examination of Rueschman, his report indicates that he reviewed her medical history, including the exams and reports from Drs. Leonard, Bressi and Pellegrino. Dr. Martens also attempted to contact Dr. Pellegrino several times

between July 14 and 16, 2010. After Pellegrino failed to respond to those requests, Martens sent him a questionnaire on July 22, 2010. When Disability RMS later followed up, Dr. Pellegrino explained that he had not seen Rueschman since May 12, 2010, and could not respond to the questionnaire.[6]

In his report, Dr. Martens noted that Rueschman was diagnosed with fibromyalgia in October 2006, but found this "diagnosis has not been confirmed in the medical record." Martens further noted: "no documentation of tender points; therefore the medical record does not substantiate a diagnosis of fibromyalgia based on American College of Rheumatology (ACR) criteria." (Dkt. #24-6 at 25.) He also noted "no documentation in the medical record … of any tender point examination or joint examination of any kind," finding that functional impairment was "not supported based on the medical record revealing normal joint examinations, no swelling in joints, and no abnormal range of motion of joints." From this, he concludes that Rueschman has no limitations or restrictions because "there is no documentation of a rheumatologic disease and therefore, there is nothing to base limitations and restrictions on." (*Id.* at 27.)

In a July 22, 2010 letter, Disability RMS upheld its initial decision denying Rueschman benefits. After reviewing her medical records, its interview with Rueschman and Dr. Martens' report, Disability RMS found that Rueschman had "no condition,

[6] Contrary to the impression left by Pellegrino's response, Rueschman had not missed or failed to schedule appointments. On the contrary, at her May 12, 2010 visit, Pellegrino set her next appoint for six months later.

alone or collectively, supporting disability from a physical perspective precluding sedentary capacity" and thus concluded that she was not disabled. (Dkt. #24-6 at 36.)

Rueschman's Second Appeal

On September 16, 2010, Rueschman faxed a letter to Disability RMS contesting the rationale for its decision and requesting an additional 90 days to submit her second appeal. On September 22nd, Disability RMS replied and gave her until October 20, 2010, to submit additional information, noting that she had already had 60 days to request a second review. Disability RMS also forwarded the file to another analyst, but postponed an actual review. On October 1st, Rueschman's counsel sent Disability RMS a letter asking for the administrative record and requesting defendants postpone the appeal while he reviewed the requested documents. Defendants complied with his request.

Rueschman's attorney sent a letter with additional information on December 1, 2010, and defendants began their review. The December 1st letter identifies numerous, purported errors in Dr. Martens' report and describes "objective evidence" that she was diagnosed with fibromyalgia and unable to work. In addition, Rueschman submitted four letters written by (1) herself, (2) Doug Rueschman, her husband, (3) Amy Swinderman, the president of a support group for patients with fibromyalgia, and (4) Bonnie Barron, whose identity and relationship to Rueschman is unclear. The letters purport to describe how fibromyalgia symptoms affect Rueschman's physical and mental abilities and limit her life activities.

During the second appeal, Disability RMS retained Dr. Andrea J. Wagner, a board certified physician in physical medicine and rehabilitation, to review Rueschman's medical history. (Dkt. #24-6, at 60.) Wagner did not examine Rueschman, but did review the full administrative record. She concluded that "based on generally accepted guidelines, a diagnosis of fibromyalgia is supported by the clinical evidence." (*Id.* at 72.) However, she also concluded that:

> The record does not support impairment of functional capacity. The record includes multiple clinical examinations. Multiple clinical examinations do not document any evidence of focal impairment, focal neurological impairment, or rheumatological impairment. The record overall is lacking in documentation of substantial musculoskeletal impairment. The only physical findings of note identified are widespread tender points. The presence of tender points and musculoskeletal tenderness do not support impairment of functional capacity and do not correlate with functional capacity. The medical documentation includes documentation on examination of normal gait and balance and a lack of musculoskeletal impairment.

(*Id.* at 72-73.)

Dr. Wagner acknowledged that "the record demonstrates longstanding complaints of pain [and] multiple tender points," but found that "the level of subjective symptoms reported is not supported by diagnostic testing to date, physical evidence of impairment or laboratory data." She further noted that:

> The record does not include any record of independently observed activity. There is no clear evidence of inconsistency in reported or observed activities noted to providers. The record does not contain substantial detail, therefore, concerning Mrs. Rueschman's actual level of activity.
>
> * * *
>
> It is notable that the self-reported symptoms and self-reported

> limitations are greater than what would be expected by the limited physical findings and lack of other findings of diagnostic testing or imaging that would support the level of symptoms and level of function reported by Mrs. Rueschman and her acquaintances and family.

(*Id.* at 74.) Dr. Wagner also reviewed the content of Rueschman's supportive letters which purported to describe her level of activity (*id.* at 68-69), but gave the letters little consideration because "[t]he accuracy of this documentation cannot be objectively determined." (*Id.* at 74.)

With respect to Dr. Pellegrino's statement about plaintiff's abilities, Dr. Wagner further stated:

> Though recent Attending Physician's Statements recommend significant restrictions, these restrictions are not supported by any medical data of physical impairment or objective medical testing. The restrictions recently detailed appear to be largely on the basis of self-reported symptoms.

(*Id.* at 74-75.)

While Dr. Wagner acknowledged that a mental health assessment was outside the scope of her analysis, she speculated that Rueschman's self-reported limitations were the result of mental health issues and offered this as a reason against attributing Rueschman's symptoms to a physical condition. (*Id.* at 74.) Dr. Wagner's ultimate conclusion was "based on the available medical evidence, Mrs. Rueschman would be functional with restrictions of no lifting, pushing, pulling, or carrying greater than 10 pounds occasionally. No other restrictions are supported by the medical documentation." (*Id.* at 75.)

On December 31, 2010, Disability RMS notified Rueschman that it was denying her second appeal based on its determination that there was no "documentation to support limitations and restrictions from a physical standpoint that would preclude work capacity in her own sedentary occupation." (Dkt. #24-6, at 76.) The letter reviewed plaintiff's medical history, but its reasoning relied primarily on Dr. Wagner's report.

Job Responsibilities for Accounting Administrators

According to the Press of Ohio's job description for an accounting administrator position, the physical demands of this position are,

> "Light physical activity performing non-strenuous daily activities of an administrative nature. Manual dexterity sufficient to do keyboard data entry and to reach and handle file folders. Ability to talk and hear. Clear vision at 20 inches or less. Moderate noise level in office associated with computers and printers. Less than 10% of time spent in the manufacturing facility with exposure to chemicals and noise."

(Dkt. #24-3, at 38.) Routine physical requirements of the job include constant keyboard use, frequent sitting, fingering, near acuity and accommodation, and occasional exerting up to 10 pounds, standing and walking, talking and hearing, handling and feeling, and color vision. (Dkt. #24-5, at 69.) In addition, the job requires analytical ability, attention to detail and mathematical computation skills. (Dkt. #24-3, at 37-38.)

OPINION

I. Standard of Review

ERISA benefit determinations are subject to plenary review, *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111, 115 (1989), unless the plan contains clear language giving the administrator discretion, in which case the court reviews the

determination under an arbitrary and capricious standard. *Herzberger v. Standard Ins.,* 205 F.3d 327, 331 (7th Cir. 2000). ERISA plans are contracts and their interpretation is guided by federal common law contract principles with some accommodation for trust principles that "confer greater protection . . . on the participant or beneficiary." *Id.* at 330. Courts "interpret the terms of the policy in an ordinary and popular sense, as would a person of average intelligence and experience, and construe all plan ambiguities in favor of the insured." *Diaz v. Prudential Ins. Co. of Am.*, 499 F.3d 640, 643-44 (7th Cir. 2007) (quotation omitted).

Here, the plan document contains no express language granting the administrator discretionary authority to interpret the contract or make benefit determinations, but defendants nevertheless make arguments in support of discretionary review. First, defendants point to section 2 of the plan, which defines "evidence of insurability" as "a statement of proof of a Person's medical history upon which acceptance for insurance will be determined by AUL." Even if this provision related to the benefits determinations (rather than to eligibility for insurance as a straightforward reading would suggest), its language would be insufficient to grant discretion. As the Seventh Circuit explained in *Herzberger*:

> the mere fact that a plan requires a determination of eligibility or entitlement by the administrator, or requires proof or satisfactory proof of the applicant's claim, or requires both a determination and proof (or satisfactory proof), does not give the employee adequate notice that the plan administrator is to make a judgment largely insulated from judicial review by reason of being discretionary.

205 F.3d at 331.

Defendant's second, and more convoluted, argument is that the plan incorporates Rueschman's notice of claim form, which grants American United discretionary authority. The plan defines the "entire contract" as "[t]he policy and applications of the individuals, the Participating Units and the Group Policyholder." (Dkt. #24-3, at 18.) The plan does not define "applications," but defendant asserts, without further explanation or evidence, that "applications" must include claim forms.

Specifically, Rueschman signed a form from American United entitled "Employee's Statement" as part of her claim for benefits, which asked for personal information, employer information, the nature of her disability, her date of disability and her treating physician. Defendants maintain that Rueschman's "Employee Statement" form became part of the contract. Specifically, defendants point to the form's fine print stating just above the signature line that "[t]he undersigned understands and agrees . . . benefits under any policy will be paid only if AUL decides in its discretion the applicant is entitled to them." (Dkt. #33, at AUL 801.) The Press of Ohio signed a similar "Employer or Administrator's Statement" form regarding Rueschman's claim, which in the fine print above the signature line also states "[t]he employer/policyholder understands and agrees . . . benefits under any policy will be paid only if AUL determines in its discretion the applicant is entitled to them." (Dkt. #33, at AUL 803.)

Since this language on the claim forms tracks the pattern "safe-harbor" recommended by the Seventh Circuit to ensure deferential review, *Herzberger,* 205 F.3d at 331, defendants argue it limits this court's review should be limited to an abuse of discretion standard, citing *Shyman v. Unum Life Ins. Co.*, 427 F.3d 452, 455 (7th Cir.

2005) (discretion provision in application for insurance was sufficient where plan expressly incorporated application).

The defendants' reliance on this supposed adoption or amendment of discretionary authority is flawed on a number of levels. Most fundamentally, a claimant's, or even Press of Ohio's, signature on a claim notice fails to meet the requirements for adoption of a binding contract term or amendment to the contract, at least absent evidence of a meeting of the minds *before* the claimant's injury.

As an initial matter, the plan does not define "applications." Ambiguities in ERISA plans are construed in favor of the insured. *Diaz*, 499 F.3d at 643-44. Nor is defendants' interpretation of the plan supported by the text. The same section of the plan that defines the "entire contract" also describes the claim process, but states only that after receiving initial notice, American United "will furnish the Person with the necessary claim forms" on which the claimant must show: "1) claimant's name; 2) Employer's name and address; 3) Group number; 4) the date Disability started; 5) the cause of Disability; and 6) the nature and extent of the Disability." (Dkt. #24-3, at 18.) This is the same information on the "employee statement" that Rueschman signed. The plan does *not* refer to claims or even the claim forms as "applications." Thus, the plan language not only fails to incorporate (or even contemplate) additional terms in Rueschman's "Employee Statement," it is arguably inconsistent with the plan's straightforward description of the claim form.

Even if claim forms were intended to be included among the plan's "applications," defendants' position would be untenable. Defendants seem to be asserting either that:

(1) the terms of the contract were left undefined as of its effective date, and reserved to American United the right to add new terms in its standardized applications, including claim forms; or (2) American United may include new terms in the fine print of its claim forms and Press of Ohio and/or claimants adopt these amended terms by filing the form. The first position directly contradicts the integration clause in the plan's original contract and may well vitiate the contract for incompleteness. The second not only appears to offend both common law and statutory protections against overreaching by a party of unequal bargaining power (if not fraud), at least with respect to an individual claimant, but is contradicted by the plan itself, which states "the policy may be amended by mutual agreement between the Group Policyholder . . . and AUL, but *without prejudice* to any loss incurred prior to the effective date of the amendment." (*Id.* (emphasis added).) As a result, slipping discretionary language into the contract as an "amendment by claim form" is ineffective as to any existing claim like Rueshman's because it prejudices the loss she suffered before filing her claim form.[7]

Finally, adopting American United's position would undermine core features of ERISA. Allowing a plan to slip provisions into a policy through the signing of a claim form would conflict with the goal of ERISA, which seeks to protect employee benefits, and with the principle that fiduciary obligations are defined by the trust terms. *Firestone Tire*, 489 U.S. at 111-115. Moreover, the "safe-harbor" language recommended by the Seventh Circuit can hardly be said to give employees notice that their insurer retained

[7] Presumably the plan's amendment provisions could be utilized by Press of Ohio, as the Group Policyholder and AUL to add discretionary language *before* a claimant's loss, but defendants offer no evidence that this occurred here.

discretion if the insurer slips the language into the contract at the employee's arguably most vulnerable moment -- when filing a claim for benefits. *See Herzberger,* 205 F.3d at 330-32; *cf. Ruttenberg v. U.S. Life Ins. Co.*, 413 F.3d 652, 659-60 (7th Cir. 2005) (insufficient notice when provision in master application during negotiations but not in the summary plan document, the certificate of insurance or documents given to the insured).[8] Therefore, the court will review defendants' benefit determination *de novo*.

II. Rueschman's Entitlement to Benefits

Under "de novo review," courts are to make an "independent decision" about the plaintiff's right to benefits by interpreting the plan language and applying that language to the facts. *Krolnik v. Prudential Ins. Co. of America*, 570 F.3d 841, 843 (7th Cir. 2009). In reaching an informed and independent decision, the court may limit the evidence to the administrative record or hear new evidence as it deems necessary. *Patton v. MFS/Sun Life Fin. Distribs., Inc.*, 480 F.3d 478, 490 (7th Cir. 2007).

To qualify for long term disability benefits, plaintiff must be "totally disabled," which the plan defines to "mean that because of Injury or Sickness . . . the Person cannot perform the material and substantial duties of [her] regular occupation." (Dkt. #24-3, at 11.) "Sickness" is defined as "illness, bodily disorder, disease, Mental Illness, or pregnancy." (*Id.* at 10.) Defendants do not dispute that fibromyalgia qualifies as a sickness under the plan, nor do they dispute Rueschman's repeated diagnoses of fibromyalgia by multiple physicians (though they adopted a contrary position in her first

[8] American also cites correspondence sent from DMRS to Rueschman four months after she filed her claim, but these documents are similarly too late to provide adequate notice, much less constitute a timely amendment.

appeal). Instead, they argue that Rueschman offered insufficient, objective medical evidence that her fibromyalgia symptoms limit her physical capacities to such an extent that she cannot perform the duties of her occupation as an accounting administrator.

Like most diseases, fibromyalgia strikes with a range of severity. The question whether Rueschman has fibromyalgia is, therefore, related to -- but at least theoretically distinct from -- the question of whether her fibromyalgia is so severe as to render her incapable of performing the duties of an accounting administrator. *Hawkins v. First Union Corp. Long–Term Disability Plan*, 326 F.3d 914, 916 (7th Cir. 2003). Moreover, because there is no objective medical test for fibromyalgia, a diagnosis must rely on the patient's subjective pain and fatigue symptoms. *Williams v. Aetna Life Ins. Co.*, 509 F.3d 317, 322 (7th Cir. 2007). Even so, the Seventh Circuit advises that functional limitations imposed by that pain and fatigue may be measured objectively. *Id.*

Defendants rely heavily on the Seventh Circuit's decision in *Williams*, which concluded that an ERISA plan administrator did not act arbitrarily and capriciously by "requiring accurate documentation from a treating physician that the claimant's subjective symptoms of pain or fatigue limit his functional abilities in the workplace." *Id.* at 323. On that basis, the court upheld the plan's rejection of a treating physician's general findings that the plaintiff had a class 5 physical impairment, because the physician (1) failed to explain why the plaintiff was capable of only low stress jobs, (2) failed to measure the plaintiff's ability to lift objects weighing over 10 pounds, and (3) reached assessments about how long the plaintiff could stand or walk while also writing that these were "unknown" or "untested." *Id.*

While defendants argue the administrator's similar rejection must be upheld here, they ignore an obvious difference in this case: the administrator in *Williams* had discretionary authority to interpret the plan and make eligibility decisions. To reach an independent determination about whether Rueschman qualifies as "totally disabled," this court cannot simply defer to the defendants' findings as to what evidence is required of claimants, nor to the defendants' assessments of that evidence.

Moreover, defendants identified no language in the plan describing what evidence Rueschman was required to file. In particular, the plan does not require Rueschman to present *objective* medical tests confirming how her pain and fatigue limit her physical and mental abilities. Under the plan's terms, Rueschman must simply prove that she is disabled, but she is not necessarily required to produce objective medical tests establishing the limits of her abilities.

In any case, Rueschman did submit objective medical evidence. Dr. Pellegrino examined Rueschman and concluded that she was physically unable to engage in continuous typing and computer work, that she should not remain in any position longer than 15 minutes and that she had difficulty concentrating and remembering. As a result, he concluded that she was "incapable of minimal (sedentary) activity" and unable to function as an accountant.[9] The conclusion appears supported in substantial part by the earlier findings of Dr. Meyer.

[9] Defendants attempt to cast aspersions on Pellegrino's statement by saying that Rueschman submitted it without request from Disability RMS and that it was submitted after previous denials, but defendants' appeals process specifically stated that they would consider any additional evidence that Rueschman submitted. (Dkt. # 24-5, at 75.)

In addition, Rueschman submitted three letters from family and acquaintances describing the impact of her symptoms on her abilities and daily activities. During the appeal process, defendants chose not to consider these letters. Dr. Wagner mentioned them, but only to state that they were not objectively verifiable.

While the letters are subjective and unsworn,[10] so are most of the other materials in the administrative record. Moreover, these individuals could testify about their observations of her symptoms and abilities without giving expert opinions. Rueschman's letter and her husband's letter are based on personal knowledge and paint a picture of significant limitations which are inconsistent with the requirements of Rueschman's job. Swinderman's and Barron's letters are open to great criticism for lack of adequate foundation, but defendants did not challenge their admissibility on that ground.[11]

Although Rueschman presented evidence that her fibromyalgia symptoms prevented her from performing her job duties, she has not demonstrated that there is no genuine dispute of fact on this issue. Over the course of her treatment, Rueschman saw nine physicians. Drs. Meyer and Pellegrino appear to be the only ones to offer an

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[10] Defendants also argue that the court should ignore the letters as evidence of Rueschman's disability because they are unsworn statements and were not given by medical experts. (Dft.'s Resp. to Plt.'s PFF., dkt. #35, at 5.) However, "Rule 56(c)(4) no longer requires a formal affidavit to be submitted, but instead allows a declaration to be used to oppose a motion for summary judgment, so long as it is 'made on personal knowledge, set[s] out facts that would be admissible in evidence, and show[s] that the affiant or declarant is competent to testify on the matters stated.' " *Jajeh v. County of Cook*, 2012 WL 1522014, at *4 (7th Cir. 2012) (quoting Fed. R. Civ. P. 56(c)(4)) (expressly noted as dicta in the opinion).

[11] Neither letter explains the basis of the author's knowledge and both letters read like a recitation of typical fibromyalgia experiences. At this point, however, it is unnecessary to determine whether their authors had personal knowledge.

opinion that Rueschman's physical limitations prevent her from performing her sedentary job duties. In fairness to Rueschman, this is not a matter of simply totaling up opinions and, even if it were, most of the other physician's exam notes offer no opinion about her physical limitations *and* reflect consistent statements by Rueschman about her own limitations. Still, the only other treating physician to offer a formal opinion about Rueschman's physical capacity was Dr. Friedman. In the fall of 2009, she reported to Disability RMS that Rueschman had only a level 4 physical impairment and full time sedentary work capacity.

Given this conflicting record, the court is unable to adopt either sides' version of the facts. Drs. Meyer's and Pellegrino's conclusions in their attending physician statements do not contain inconsistencies like those found in the physician's questionnaire in *Williams*, but also do not explain how they determined that Rueschman (1) could not engage in continuous typing, (2) could not sit for more than 15 minutes and (3) had difficulty with concentration and memory. These findings may have rested on medically-sound observations or testing or have simply rested on Rueschman's self-reports.[12]

In addition, Rueschman's medical record was reviewed by several physicians who concluded that the evidence did *not* warrant a finding of total disability. While Drs. Hogan, Martens and Wagner did not physically examine Rueschman, that alone is not

[12] In expressing his opinion about Rueschman's mental abilities, Dr. Pellegrino makes no reference to her history of anxiety and depression. Moreover, his subsequent conduct -- in not responding to defendants' physicians and declining to respond to defendants' questionnaire -- call his credibility into question.

reason to discount their reports altogether. Dr. Martens' report arguably warrants little weight as it includes significant errors (particularly with respect to his finding that the record contains no tender point examination or joint examination and to his conclusion that Rueschman has no restrictions or limitations), but Dr. Wagner offered a thorough report that considered all of the record. And while Rueschman challenges Wagner's reasoning, these challenges only go to the weight the court should give her conclusions.

Finally, in an attempt to overcome this conflicting record, Rueschman argues that she had no legal obligation to present objective evidence of her limitations, citing the Seventh Circuit in *Heckler.* However, the *Heckler* court held only that an ERISA administrator could not reject claims of fibromyalgia based on a lack of objective tests, because the only diagnostic techniques rely on self-reported pain symptoms. From this, Rueschman argues that physicians must also rely on self-reported symptoms to evaluate a patient's physical limitations. Hence, Rueschman maintains defendants' insistence on objective evidence of physical limitations is contrary to *Heckler*.

Unfortunately for Rueschman, this factual and legal syllogism is simply in error. As the Seventh Circuit explained in *Williams*, a physician *can* provide objective observations about a patient's physical and mental abilities. 509 F.3d at 322. For example, she can observe how the patient's pain and fatigue affect her during the visit and can perform functional capacity tests. To be clear, the court is not concluding that such functional capacity tests are necessary, only that Dr. Wagner and defendants may challenge the reliability of Dr. Pellegrino's opinion on grounds that he relied too heavily on Rueschman's self-reported symptoms, rather than on more objective observations.

Based on the administrative record, the court concludes that there is a genuine dispute of material fact about the extent to which Rueschman's fibromyalgia limits her ability to perform the material duties of her employment. Accordingly, the court will deny both plaintiff's motion and defendants' cross-motion for summary judgment and will consider *de novo* evidence on this issue at trial.

ORDER

IT IS ORDERED that

1. Plaintiff Kathy Rueschman's motion for summary judgment (dkt. #22) is DENIED;

2. Defendants American United Life Insurance Co. and Disability Reinsurance Management Services, Inc.'s motion for summary judgment (dkt. #34, at 20) is DENIED.

3. The court will hold a telephonic status conference on Thursday, June 14, 2012, at 11:00 a.m. in anticipation of the upcoming bench trial; plaintiff to initiate the call to the court.

Entered this 12th day of June, 2012.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge